IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,	)	No. 57267-9-I
	)	
Respondent,	)	
	)	
v.	)	
	)	
RONALD LO-TIEN KUO	)	UNPUBLISHED OPINION
	)	
Appellant.	)	FILED: September 25, 2006
	)	

PER CURIAM. Ronald Lo-Tien Kuo was convicted of two counts of possession of controlled substances following denial of his motion to suppress evidence. He contends the pat-down frisk that led to the discovery of controlled substances was not justified. We disagree and affirm.

BACKGROUND

On March 28, 2005, at approximately 4:30 in the morning, Seattle police officer Scotty Bach was patrolling the Belltown neighborhood of downtown Seattle. As he drove along Western Avenue, he noticed an Asian male in his thirties wearing a puffy jacket, later identified as Ronald Lo-Tien Kuo. Kuo was standing outside the doorway of a condominium building, attempting to gain access to the building. Bach made eye contact with Kuo, who immediately walked away from the vestibule.

Bach continued driving down the street, planning to return to the building later to

monitor the situation. Minutes later, however, Bach was dispatched to the same building in response to a 911 call. A resident had reported an unidentified male was trying to access the building by calling various apartments using the intercom system. This person was reportedly telling residents that his girlfriend lived in the building, and that he was locked out because she had fallen asleep. The resident reported that the individual was unable to provide the girlfriend's apartment number when asked.[1] The physical description given by the caller matched the characteristics noted by Bach when he first saw Kuo in the entryway.

When Bach returned to the building, he found Kuo sitting in the driver's seat of a car on a nearby corner. The car was running, with its lights on. The driver's window was open. All the other windows were closed, and because they were tinted, Bach could not see into the car's backseat.

Bach and fellow officer Lang approached Kuo's car on foot. Bach spoke with Kuo, who admitted that he had been dialing numbers on the condominium intercom. Kuo again stated that his sleeping girlfriend lived inside. Bach requested Kuo produce identification. While answering further questions, Kuo patted his coat and pants and reached into his pants pocket as though searching for a wallet. Apparently not finding identification in these pockets, Kuo reached into the backseat. He returned his hands to the front seat empty-handed, and then reached into the backseat a second time.

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[1] Bach testified that during follow-up investigation after Kuo's arrest, the resident who placed the 911 call described that she disbelieved Kuo's assertion that his girlfriend lived in the building because the apartment number he gave was higher than the highest apartment number in the building. At the time of the stop, frisk and arrest, Officer Bach only knew that Kuo had given a "wrong" number for the girlfriend's apartment. Report of Proceedings (RP) (Oct. 10, 2005) at 23.

After Kuo reached into the backseat of the car twice, Bach ordered him out of the car and patted down his outer garments. As a result of the frisk, Bach discovered a pair of brass knuckles in Kuo's jacket and arrested him for violation of Seattle's concealed weapon ordinance. A search of the car incident to Kuo's arrest led to the discovery of more than 200 tablets of Diazepam, 50 grams of marijuana, and a scale with marijuana residue on it.

Kuo was charged with possession of controlled substances. Kuo moved to suppress the evidence found in the search incident to his arrest, arguing Bach lacked an articulable basis to believe Kuo posed a risk to officer safety.

At the CrR 3.6 hearing, Bach testified that in his experience, repeated dialing of numerous apartments is a common method used by burglars to enter buildings with the goal of robbing storage lockers or car garages. Bach testified that he frisked Kuo out of concern for his own and officer Lang's safety because he did not know what Kuo was reaching for in the backseat:

> A: I asked to see his ID.
>
> Q: How did he respond?
>
> A: He tried to look for it. He looked in his pants. He had some pants on, and a bulky jacket. He then reached to the back of the car and then back to the front of the car and back of the car. The car had tinted windows and all the other windows were up. I couldn't see what he was reaching for. But it didn't appear that he was making an effort to find his license, or he didn't know where his license was. And at that point, I asked him to step out of the vehicle.
>
> Q: Could you describe for the court what that means, it didn't appear he was making an effort?
>
> . . . .
>
> A: Most people that I deal with, that I contact and ask to see the

> driver's license, go for the driver's license in their pocket or from the console or wherever. Somebody who is just touching themselves or looking into their pocket and then reaching in the back, like he didn't know what he was grabbing for.
>
> Q: What were your thoughts about him reaching into the back of the car?
>
> A: Well, I'm concerned for my safety and the other officer on the other side of the car's safety. Not knowing what he is really grabbing for.

RP (Oct. 10, 2005) at 17–18. On cross-examination, he conceded that he believed Kuo was trying to find the requested identification:

> Q: Did he indicate anything to you like, you know, wait a minute, he knew where his ID was?
>
> A: No.
>
> Q: Did he say anything to you about what he was doing?
>
> A: I know he was looking for his ID. I believe he was still answering questions as he was doing that.

RP (Oct. 10, 2005) at 30.

The court denied the motion to suppress, and convicted Kuo on both counts in a trial on stipulated facts, from which Kuo appeals.

DISCUSSION

In reviewing a ruling on a motion to suppress, we review the findings of fact for substantial evidence and the conclusions of law de novo. State v. Mendez, 137 Wn.2d 208, 214, 970 P.2d 722 (1999).

One exception to the requirement that a search be authorized by a warrant is the protective frisk that may accompany a Terry stop. State v. Lennon, 94 Wn. App. 573, 579, 976 P.2d 121 (1999) (citing Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d

889 (1968)). A Terry frisk is lawful when "(1) the initial stop is legitimate, (2) there is a reasonable safety concern justifying a protective frisk for weapons, and (3) the scope of the frisk is limited to the protective purposes." Id. at 580. Kuo contends that the second of these requirements was unmet here.

"A protective frisk is justified only when the officer can point to 'specific and articulable facts' that create an objective, reasonable belief that the suspect is armed and dangerous." Id. (citing Terry, 392 U.S. at 21–24). Though the officer's concern must be objectively reasonable, we evaluate the totality of the circumstances, including subjective components such as that officer's training and experience. State v. Glover, 116 Wn.2d 509, 514, 806 P.2d 760 (1991); State v. Coutier, 78 Wn. App. 239, 244, 896 P.2d 747 (1995).

Mere identification of a potential hazard to officer safety is insufficient to justify a protective pat down. Thus, the fact that a car passenger's hands were concealed under a blanket was an insufficient basis for an articulable suspicion of being armed and dangerous where the passenger was neither nervous nor furtive, cooperated with police instructions, and the cold weather accounted for the blanket covering his hands. State v. Terrazas, 71 Wn. App. 873, 879, 863 P.2d 75 (1993); see also State v. Parker, 139 Wn.2d 486, 499, 987 P.2d 73 (1999) (generalized concern for officer safety does not justify full search of nonarrested companions of arrestee).

Police need not have actual knowledge a suspect is armed and dangerous before initiating a frisk. State v. Collins, 121 Wn.2d 168, 173, 847 P.2d 919 (1993) (citing Terry, 392 U.S. at 27). Instead, police need only a "founded suspicion"

providing "'some basis from which the court can determine that the [frisk] was not arbitrary or harassing.'" Id. (quoting State v. Belieu, 112 Wn.2d 587, 601–02, 773 P.2d 46 (1989)) (alteration in original). In other words, "any reasonable basis supporting an inference that the investigatee or a companion is armed will justify a protective search for weapons." State v. Wilkinson, 56 Wn. App. 812, 818, 785 P.2d 1139 (1990).

A potential innocent explanation for behavior that legitimately raises concerns for officer safety does not vitiate the lawfulness of a frisk. For example, in State v. Kennedy, 107 Wn.2d 1, 11, 726 P.2d 445 (1986), a frisk was justified where an officer saw the driver of a vehicle lean forward furtively as though hiding an object in the car before stopping the car. Similarly, in State v. Wilkinson, 56 Wn. App. 812, 818, 785 P.2d 1139 (1990), a frisk was upheld where the officer saw one passenger lean down repeatedly before the car pulled over, the car did not pull over immediately after the police signal, and where the arresting officer recognized two passengers from unrelated felony arrests. The Wilkinson court noted the potentially innocent nature of the suspect's movements, namely that it was consistent with "adjustment of the seat, dropping a cigarette, [or] spilling a Coke," but emphasized that "the Constitution does not require an officer to wager his physical safety against the odds that a suspected assailant is actually unarmed." Id. at 817–18 (citing Belieu, 112 Wn.2d at 602 n.3).

In keeping with this sentiment, Washington courts have upheld protective searches in deference to the quick decisions made by officers in the field to preserve the safety of the officer and others. Collins, 121 Wn.2d at 175–76 (officer recognized defendant, who had possessed ammunition and holster at prior arrest); State v.

Franklin, 41 Wn. App. 409, 415–16, 704 P.2d 666 (1985) (search of bag justified where suspect told officer bag contained gun). Factors considered in evaluating the reasonableness of the frisk include the time of night an incident occurs and lighting in the area. See, e.g., State v. Horrace, 144 Wn.2d 386, 398–99, 28 P.3d 753 (2001) (time of day appropriately considered as factor in reviewing reasonableness of trooper decision to frisk suspect).

The trial court concluded Officer Bach's concerns for his safety were justified because Kuo was "suspected [of] criminal activity, and in consideration of Kuo's movements towards and into the backseat of his car, the officer's limited ability to see inside, Kuo's inability to produce identification promptly, and Kuo's bulky clothing." Clerk's Papers at 145–46. The court clarified its ruling in its denial of Kuo's motion for reconsideration:

> the activity that the officer observed the defendant performing, taken into conjunction with . . . the information that the officer received from dispatch, that somebody was ringing a doorbell, had the wrong apartment number, and it was 4:30 in the morning and it was dark, and the defendant left the vestibule of the apartment as soon as he made eye contact with the officer, and the defendant was then sitting in his car, the officer could see his hands and he could see that there was nothing in them. But the officer did see him twice going in back where he could not see his hands.

RP (Oct. 31, 2005) at 11.

Kuo emphasizes that he readily admitted he had been dialing various apartments, cooperatively answered Bach's questions, and attempted to comply with his instructions. He likens his circumstances to those in State v. Terrazas, 71 Wn. App. 873, 863 P.2d 75 (1993), which held a frisk unlawful where the subject, a passenger in

a car pulled over for erratic driving, cooperated with police instructions and the cold weather accounted for the fact the suspect's hands were concealed under a blanket.

But Terrazas is distinguishable. First, Kuo was not a passenger in a car whose driver had come under suspicion. Kuo himself had excited attention of police by behaving in a manner consistent with criminal activity. The potentially innocent nature of Kuo's movements does not preclude an inference that he might have been reaching for a weapon, given that while purporting to search for his identification, he ineffectually patted his clothing and twice removed his hands from view by reaching into a part of the car darkened further by tinted windows.

Kuo emphasizes Officer Bach's testimony that he "knew" Kuo reached into the backseat in an effort to locate his identification. Officer Bach was clear, however, that Kuo's effort seemed disingenuous. The record supports the court's finding that Kuo's behavior created a genuine concern that Bach could not proceed safely until he ensured Kuo did not have access to a weapon.

The frisk was constitutional, and the motion to suppress was properly denied.

Affirmed.

FOR THE COURT: